IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 3

WCC No. 2006-1649

ROBERT BENHART

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer.

DECISION AND JUDGMENT

Summary: Petitioner suffered a work-related injury on January 15, 2003. Prior to his injury, he had been diagnosed with Hepatitis C. Subsequent to Petitioner's injury, and for unrelated reasons, his Hepatitis C worsened and his health declined. Respondent denied liability for PTD benefits, arguing that although Petitioner's Hepatitis C predated his work-related injury, the Hepatitis C did not cause Petitioner's health to decline until after his work-related injury. Petitioner argued that even without taking his Hepatitis C into account, his work-related injury rendered him permanently totally disabled.

Held: The parties agreed that Petitioner's condition prior to the effects of the Hepatitis C limited Petitioner to, at most, a part-time job which his treating physician approved only on a trial basis and that it was reasonably foreseeable that Petitioner would be physically unable to function at that level. However, no job analyses were submitted. The Court concludes that even without taking Petitioner's subsequent complications from Hepatitis C into account, he is permanently totally disabled.

¶ 1 Petitioner Robert Benhart petitions this Court for permanent total disability (PTD) benefits. The parties have agreed to submit this case for decision by this Court based on stipulated facts which are set forth below.

STIPULATED FACTS[1]

¶ 2 Petitioner injured his back on January 15, 2003, while performing his duties as a truck driver for Lumber Supply Company of Great Falls, Montana.

¶ 3 Respondent accepted liability and paid indemnity and medical benefits, including payment of permanent partial disability (PPD) benefits, reserving vocational rehabilitation benefits and PTD benefits.

¶ 4 Petitioner suffered a work-related injury in a motor vehicle accident on October 24, 1991. He has been treated for headache, neck pain, and periscapular pain.

¶ 5 Petitioner was diagnosed with Hepatitis C prior to his January 15, 2003, workers' compensation claim.

¶ 6 Chronic Hepatitis C has a known and significant association with subsequent development of cirrhosis and liver cancer.

¶ 7 After being diagnosed with Hepatitis C and after his January 15, 2003, work-related injury, Petitioner's liver failed and he developed liver cancer. He underwent a liver transplant in the fall of 2004.

¶ 8 Petitioner's work-related injury did not cause or aggravate his Hepatitis C, liver failure, liver cancer, or his need for a transplant.

¶ 9 Even prior to the development of liver failure and liver cancer and impairments related thereto, Petitioner was not capable of returning to his preinjury position and would, at most, have been capable of part-time sedentary to well-selected light work. Even this level of release would have been challenged by his decreased tolerance for riding in a car. He lives approximately 30 miles outside of Great Falls and this would have been a significant barrier. Hence, his maximum level of release based on impairments related to his work-related low-back pain would have been four hours sedentary to well-selected light work with a walk/sit/stand option. It is quite possible he would not have demonstrated consistency of function even at the sedentary level to allow a five day, four-hour-per-day, week. Only a trial would have demonstrated this and, given the superimposition of deficits related to his liver cancer, liver failure, and liver transplant, this trial will not occur.

[1] All stipulated facts originate in the parties' Revised Stipulation for Submission of Case on Agreed Facts, Docket Item No. 9.

¶ 10 Dr. James Hinde's reports of March 7, 2006, and September 26, 2005, are submitted as agreed facts. The Court finds the following fact from Dr. Hinde's reports to be pertinent to its Decision:

¶ 10a Petitioner is currently permanently and totally disabled.[2]

¶ 11 Petitioner was determined to be disabled under the Social Security Administration guidelines for disability as of June 1, 2004.

¶ 12 Respondent has denied Petitioner PTD benefits.

¶ 13 The mediation provisions set forth in § 39-71-2401, MCA, have been met.

ISSUES

¶ 14 The parties agree that the following are the issues to be decided:

¶ 14a Whether Petitioner is permanently totally disabled under the Workers' Compensation Act;

¶ 14b Whether Petitioner is entitled to permanent total disability (PTD) benefits; and

¶ 14c Whether Petitioner is entitled to other benefits under the Workers' Compensation Act.

DISCUSSION

¶ 15 This case is governed by the 2001 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Petitioner's injury.[3]

¶ 16 Petitioner states that Dr. Hinde is his treating physician, and points out that Dr. Hinde has concluded that Petitioner is permanently and totally disabled. Petitioner further notes that he was determined to be disabled under the Social Security Administration guidelines and adds that Respondent has no medical or vocational evidence to indicate that Petitioner is not permanently totally disabled.

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[2] September 26, 2005, report at 1.

[3] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 17 Respondent responds that PTD is a legal determination under the WCA, and while a medical opinion is a part of that determination, it is not conclusive in and of itself. Respondent argues that under § 39-71-116(24), MCA (2001), to be considered permanently totally disabled for purposes of workers' compensation benefits under the WCA, Petitioner must prove that he meets the following statutory definition:

> "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

¶ 18 Respondent further points out that pursuant to § 39-71-407(1), MCA, an insurer is only liable for injuries arising out of and in the course of employment, and pursuant to § 39-71-119, MCA, an "injury" can only be caused by an accident. Therefore, Respondent would conclude that Petitioner does not meet the statutory criteria for PTD benefit eligibility because his Hepatitis C is not a physical condition resulting from an injury as defined in the statutes.

¶ 19 Petitioner replies that this Court has previously held that preexisting medical conditions must be taken into consideration by the insurer when determining whether a claimant has a reasonable prospect of physically performing regular employment, even if the preexisting condition is not exacerbated by the industrial injury. Alternatively, Petitioner argues that he is an "odd-lot" employee. Petitioner argues that in either of these situations, this Court has previously held that the burden is not on Petitioner to prove that he is entitled to PTD benefits. Rather, the burden is on the insurer to prove that Petitioner is ***not*** entitled to PTD benefits.[4]

¶ 20 Petitioner further argues that, even if this Court relies solely on his physical condition at the time of his industrial injury, the facts demonstrate that he cannot physically perform regular employment and, therefore, he is entitled to PTD benefits. Petitioner points out that the parties have stipulated that even prior to his liver disease, he was not capable of returning to his preinjury position and would, at most, have been capable of part-time sedentary to well-selected light work. Given his location and his inability to tolerate automobile travel, the odds of his finding such employment are slim. Even if such

[4] *Weisgerber v. American Home Assurance Co.*, 2005 MTWCC 8, ¶ 32.

employment were obtained, Petitioner would have taken the position on a trial basis only with no guarantee that he would have been able to perform the job successfully.

¶ 21 In light of the stipulated facts, the Court can resolve this case by relying solely on Petitioner's condition at the time of his industrial injury without having to reach the issue of whether the post-industrial injury worsening of Petitioner's Hepatitis C can be taken into account in determining whether he meets the statutory criteria for PTD benefits under the WCA.

¶ 22 According to Petitioner's treating physician, his condition at the time of his industrial injury, without taking the subsequent worsening of Petitioner's Hepatitis C into account, made Petitioner's prospect of returning to work guarded at best, with the best-case scenario being part-time sedentary to well-selected light employment. Petitioner's treating physician took into consideration Petitioner's limited tolerance for riding in a car and that Petitioner lives 30 miles away from the nearest community where he might find such employment. Petitioner's treating physician was not convinced that Petitioner would successfully engage in part-time employment but suggested Petitioner take a position on a trial basis. The parties agree it is "quite possible" that even in a sedentary position, Petitioner would have been unable to maintain a 20-hour work week.

¶ 23 Under other circumstances, this Court would be disinclined to simply give the benefit of the doubt to a claimant who was released to employment on a trial basis and who did not undertake the employment. In the present case, however, the record is clear that Petitioner's health has declined to such an extent that attempting to work on a trial basis is impossible. Therefore, the Court must determine, without taking Petitioner's subsequent complications from Hepatitis C into account, whether Petitioner would have had a reasonable prospect of physically performing regular employment as contemplated by § 39-71-116(24), MCA.

¶ 24 In arguing what constitutes "regular employment," Petitioner relies on *McFerran v. Consolidated Freightways*,[5] arguing a job must be "substantial and significant" to be considered "regular employment," pursuant to § 39-71-116(24), MCA. Petitioner contends that since he would, at most, be able to work 20 hours per week, he would not have been able to obtain a job which would be substantial and significant enough to constitute "regular employment." In *McFerran*, the Montana Supreme Court reversed this Court's determination that a claimant who could perform the duties of a part-time pharmacy delivery driver was not permanently totally disabled.[6] The Montana Supreme Court reasoned that the delivery driver job, which guaranteed no more than an hour of work each

[5] *McFerran v. Consolidated Freightways,* 2000 MT 365, 303 Mont. 393, 15 P.3d 935.

[6] *McFerran*, ¶ 3.

day, was not substantial and significant and therefore did not constitute "regular employment."[7]

¶ 25 Respondent points out that, in *McFerran*, the delivery driver job which was not found to be substantial and significant enough to constitute regular employment consisted of as few as five hours of work per week, while in the instant case, Petitioner's treating physician opined that Petitioner might be able to work up to 20 hours per week.[8] However, although not cited by the parties, this Court notes that in *DesJardins v. Liberty Northwest Ins.*,[9] this Court concluded that a claimant whose treating physician opined that he could engage in sedentary employment activities for up to three hours per day was permanently totally disabled because the Court believed he had "no reasonable prospect of physically performing regular employment."[10]

¶ 26 The Court also finds direction in *Crowell v. State Compensation Ins. Fund*.[11] In *Crowell*, even though the Court was not convinced that the claimant was physically unable to do light work and acknowledged that a lack of immediate job openings is not a factor in determining whether a claimant is permanently totally disabled, the Court asserted that the insurer must still identify specific jobs for which the claimant is qualified and competitive for. Where the only identified job was a low paying, part-time, seasonal position, the Court considered the claimant to be PTD under the WCA.

¶ 27 In some respects, it is difficult for the Court to ascertain whether Petitioner's condition at the time of his industrial injury would still cause him to be permanently totally disabled without taking into account the physical deterioration caused by his Hepatitis C. However, an analogous situation has been analyzed both by this Court and the Montana Supreme Court.

¶ 28 In *Larson v. Cigna Ins. Co.*,[12] the claimant Larson suffered a heart attack and underwent heart surgery. Several months later, he returned to work and suffered an inguinal hernia as a result of an industrial accident. Larson again returned to work, but was soon laid off because he was unable to perform his job. Larson then considered himself

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[7] *McFerran*, ¶ 17.

[8] *McFerran*, ¶ 17; see ¶ 9 above.

[9] *DesJardins v. Liberty Northwest Ins.*, 1997 MTWCC 50.

[10] *DesJardins,* Conclusion of Law 4.

[11] *Crowell v. State Comp. Ins. Fund*, 1999 MTWCC 27.

[12] *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 894 P.2d 327 (1995) ("*Larson I*").

unable to work and he retired.[13] This Court held that Larson was ineligible for PTD benefits for the hernia because he first became totally disabled by his preexisting, nonwork-related heart condition.[14] The Montana Supreme Court reversed and remanded, holding that if the evidence demonstrated that the hernia produced a permanent total disability, Larson would be entitled to benefits under the WCA, regardless of the fact that his preexisting, nonwork-related heart condition may also have caused him to be permanently totally disabled. The Montana Supreme Court then ordered this Court to make specific findings and conclusions as to whether the hernia constituted an independent, totally disabling work-related condition.[15]

¶ 29 On remand, this Court again concluded that Larson was not entitled to PTD benefits on the grounds that he did not prove that his hernia, irrespective of his heart condition, precluded him from working.[16] The Montana Supreme Court disagreed and reversed this Court. The Supreme Court reasoned that, even with his heart condition factored out, Larson had several physical impairments and, because an employer takes the employee subject to the employee's physical condition at the time of employment, Larson's overall physical condition at the time of his employment had to be taken into consideration in determining his employability.[17]

¶ 30 In reaching its decision, the Montana Supreme Court looked to the job analyses which had been prepared by two rehabilitation counselors. One counselor did not identify any specific job which would have been available to Larson after his layoff.[18] The second counselor prepared several job analyses, only one of which was approved by Larson's treating physician. Larson's treating physician further qualified that approval by stating that the lifting requirements would have to be modified. A second physician who reviewed the job analyses approved none of them.[19] The Montana Supreme Court concluded that, in light of the lack of approved jobs, combined with Larson's age, work experience, and health problems, Larson did not have a reasonable prospect for employment.[20]

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[13] *Larson I*, 271 Mont. at 99, 894 P.2d at 327-28.

[14] *Larson I*, 271 Mont. at 101, 894 P.2d at 328.

[15] *Larson I*, 271 Mont. at 104, 894 P.2d at 330-31.

[16] *Larson v. Cigna Ins. Co.*, 276 Mont. 283, 289, 915 P.2d 863, 867 (1996) ("*Larson II*").

[17] *Larson II*, 276 Mont. at 291, 915 P.2d at 868.

[18] *Larson II*, 276 Mont. at 290, 915 P.2d at 867.

[19] *Larson II*, 276 Mont. at 290-91, 915 P.2d at 868.

[20] *Larson II*, 276 Mont. at 292, 915 P.2d at 869.

¶ 31 In the case before this Court, no job analyses have been submitted. At first glance, it may appear unreasonable to expect job analyses to be prepared for an injured worker who will undoubtedly never return to work. As Petitioner has pointed out, however, Respondent has the burden of proving that Petitioner is not entitled to PTD benefits. In *Weisgerber*, this Court explained:

> Ordinarily, the claimant bears the burden of proof. However, that burden must be viewed in light of section 39-71-609(2), MCA (2001) . . . . Subsection (2)(c) puts the burden on the insurer to, in the first instance, obtain a physician's approval of one or more jobs suitable for the claimant. Thus, it bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled.[21]

Without submitting approved job analyses, Respondent has not proven that any job exists which Petitioner would have been capable of performing but for the complications of his Hepatitis C.

¶ 32 Respondent contends that Petitioner does not meet the statutory definition of permanently totally disabled under the WCA. However, Respondent has not met its burden of proof in this regard. Respondent has not proven, as required by § 39-71-609(2)(c), MCA, that a physician has approved one or more jobs suitable for Petitioner. A general description of the type of job which, ***if it exists***, would accommodate Petitioner's physical limitations, will not suffice.

¶ 33 The Court determines that Petitioner is permanently totally disabled under the WCA. Petitioner is therefore entitled to PTD benefits. Furthermore, as the prevailing party, Petitioner is entitled to his costs.[22]

ORDER AND JUDGMENT

¶ 34 Petitioner is permanently totally disabled under the Workers' Compensation Act.

¶ 35 Petitioner's request for PTD benefits is **GRANTED**.

¶ 36 Petitioner is entitled to his costs.

¶ 37 This JUDGMENT is certified as final for purposes of appeal.

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[21] *Weisgerber*, 2005 MTWCC 8, ¶ 32 (internal citations omitted).

[22] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand* at 1996 MTWCC 33).

¶ 38 Any party to this dispute may have twenty days in which to request reconsideration from this DECISION AND JUDGMENT.

DATED in Helena, Montana, this 5th day of January, 2007.

(SEAL)

/s JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Larry W. Jones
Submitted: October 20, 2006